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No. 01-1846

In The

SUPREME COURT OF THE UNITED STATES

October 2001 Term

LEGAL ENVIRONMENTAL ASSISTANCE FOUNDATION, INC.,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent,

and

STATE OIL AND GAS BOARD OF ALABAMA,
Intervenor.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

Did the United States Eleventh Circuit Court of Appeals correctly affirm the determination by the United States Environmental Protection Agency pursuant to Section 1425 of the Safe Drinking Water Act that Alabama's Underground Injection Control Program represents an effective program to prevent underground injection which endangers drinking water sources?

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COUNTER-STATEMENT OF THE CASE

Since the earliest underground mining of coal in Alabama during the nineteenth century, coal miners faced dangers from underground explosions caused by methane gas. R. File Folder 6, § 12. Recovery of methane gas was initiated in the 1980's to degasify coalbeds to allow underground mining without the danger of methane gas explosions. *Id.* Since the commencement of coalbed methane recovery operations in Alabama, operators have begun to drill and produce coalbed methane gas that is unrelated to coal mining. R. File Folder 6, § 12. Nearly 5,000 coalbed methane wells had been drilled in Alabama at the time of the EPA hearings conducted in connection with Alabama's revised Underground Injection Control Program under review. R. File Folder 6, § 9.

Beginning in the early 1980's, Alabama's coalbed methane industry utilized the technique of hydraulic fracturing to stimulate gas production. R. File Folder 6, § 12.

In 1974, Congress enacted the Safe Drinking Water Act for the purpose of protecting underground sources of drinking water. 42 U.S.C. § 300h. Under the Safe Drinking Water Act, EPA may approve a state for primary enforcement responsibility for underground injection activities within that state. 42 U.S.C. § 300h-1.

In 1980, Congress amended the Safe Drinking Water Act in order to provide an alternative for the states to obtain primary responsibility for oil and gas Underground Injection Control (hereinafter referred to as "UIC") programs. Section 1425 of the Safe Drinking Water Act, codified at 42 U.S.C. § 300h-4. On August 2, 1982, EPA granted the State Oil and Gas Board of Alabama (hereinafter referred to as "Board") responsibility or "primacy" for its UIC Program under Section 1425 of the Safe Drinking Water Act. *Legal*

Environmental Assistance Foundation v. Environmental Protection Agency, 118 F.3d 1467, 1470 (11th Cir. 1997).

In 1997, on appeal of an EPA order, the United States Eleventh Circuit Court of Appeals held that hydraulic fracturing constitutes injection under the Safe Drinking Water Act. *Id.*

In response to the order of the Eleventh Circuit, the Board conducted hearings and then adopted new regulations specifically addressing and regulating hydraulic fracturing of coalbed methane wells. The Board submitted its revised UIC Program to EPA, and on January 19, 2000, EPA issued its final rule approving Alabama's Class II UIC Program revision as administered by the Board. On January 25, 2000, the Legal Environmental Assistance Foundation, Inc. (hereinafter referred to as "LEAF") filed a Petition for Review of a Final Order of EPA in the United States Court of Appeals for the Eleventh Circuit. The Board filed a Motion to Intervene, and the Board's Motion was granted by Order of the Eleventh Circuit Court of Appeals.

On December 21, 2001, after hearing oral argument, the United States Eleventh Circuit Court of Appeals issued its decision that denied in part and granted in part the petition of LEAF. *LEAF v. EPA and State of Alabama Oil and Gas Board*, 276 F.3d 1253, 1264 (11th Cir. 2001).

In its decision, the Eleventh Circuit ruled that (1) Alabama's revised UIC Program is governed under Section 1425 of the Safe Drinking Water Act, codified at 42 U.S.C. § 300h-4 (LEAF has not appealed the Court's ruling on this issue); and (2) Alabama's UIC Program complies with the statutory requirements of Section 1425 of the Safe Drinking Water Act. Further, the Eleventh Circuit remanded the case in part to EPA ruling that EPA's decision to classify hydraulic fracturing of coal beds as a "Class II-like

underground injection activity" is inconsistent with the EPA regulations. *Id.*

On June 12, 2002, LEAF filed a Petition for Writ of Certiorari to the United States Supreme Court.

REASONS FOR DENYING THE WRIT

I. There is no substantial federal question raised with the Court in the Petition for Writ of Certiorari.

LEAF contends the Court erred in affirming EPA's determination that Alabama's UIC Program complies with the statutory requirements of the Safe Drinking Water Act. In the case below, EPA's determination applied only to the Alabama UIC Program and not to programs in other states. The program under review is a program unique to Alabama. No other state has a UIC Program identical to the Alabama program. A ruling by the Court would, therefore, address only one state's UIC Program.

Further, a ruling by the Supreme Court on the petition would merely address an alleged error in the decision of the Eleventh Circuit; i.e., LEAF's allegation that the Court erred in not requiring operators of coalbed methane wells to satisfy the state that the proposed injection of hydraulic fracturing fluids would not result in the presence of any contaminant in underground sources of drinking water (hereinafter referred to as "USDW") that may affect the health of persons. The United States Supreme Court has stated that the "Court's review . . . is discretionary and depends on numerous factors *other than the perceived correctness of the judgment*" under review. *Ross v. Moffitt*, 417 U.S. 600, 617 (1974) (emphasis added).

By granting certiorari in this case, the United States Supreme Court would simply be reviewing the same facts considered by EPA, which were subsequently reviewed by

the Eleventh Circuit Court of Appeals to determine whether Alabama's UIC Program represents an effective program to prevent underground injection that endangers drinking water sources. The United States Supreme Court has stated that it will not exercise jurisdiction to decide a question that turns solely upon an analysis of the particular facts. *United States v. Johnston*, 268 U.S. 220, 227 (1925). As the United States Supreme Court stated in *Berenyi v. Immigration Service*, 385 U.S. 630, 636 (1967), "This Court possesses no empirical expertise to set against the careful and reasonable conclusions of lower courts on purely factual issues." This principle is particularly applicable to this case. The decision whether the Alabama UIC Program represents an effective program to prevent underground injection that endangers drinking water sources turns on the particular facts in the case. The Eleventh Circuit "carefully considered each argument and conclude[d] that none of these arguments would support setting aside the agency's determination in this case." *LEAF*, 276 F.3d at 1265, note 13.

This case does not present the basis for a far-reaching decision of general public significance by the United States Supreme Court.

II. The United States Court of Appeals correctly held that Alabama's Underground Injection Control Program represents an effective program to prevent underground injection that endangers drinking water sources.

The Eleventh Circuit "reject[ed] LEAF's argument that EPA's rule arbitrarily determines that Alabama's UIC Program complies with the statutory requirements." *LEAF*, 276 F.3d at 1253, 1265.

In affirming EPA's determination, the Court undoubtedly was cognizant of the strict rule adopted by Alabama and approved by EPA. Dr. Donald Oltz, Alabama State Geologist, described the Alabama regulations as "the

strictest and most comprehensive regulations of any state in the nation." R. File Folder 6, § 11, Public Hearing Transcript, p. 36.

The following is a summary of the Alabama UIC Program addressing hydraulic fracturing[1]:

1. The program requires written approval of any fracturing operation. *State Oil and Gas Board of Alabama Administrative Code* Rule 400-3-8-.03(5).
2. The Board's technical staff of geologists and engineers reviews each fracturing proposal. *State Oil and Gas Board of Alabama Administrative Code* Rule 400-3-8-.03(6).
3. The Board's technical staff evaluates the construction of the coalbed methane gas wells to ensure that each well is constructed with proper casing and cement in order "to prevent upward movement of fluids during fracturing operations." *State Oil and Gas Board of Alabama Administrative Code* Rule 400-3-8-.03(6)(b)(2),(c)2. Any well that fails to comply with requirements for well construction "shall not be allowed to produce and may be required to be immediately plugged and abandoned." *State Oil and Gas Board of Alabama Administrative Code* Rule 400-3-8-.03(6)(a)(2).
4. The technical staff reviews well logs to ensure that impervious strata overlie the uppermost coal bed being fractured to form a barrier to the upward movement of fluids to protect underground sources of drinking water. *State Oil and Gas Board of Alabama Administrative Code* Rule 400-3-8-.03(6)(a)5.

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[1] The regulations that constitute the Alabama UIC Program are set forth in the Appendix to this brief.

5. The Alabama regulations bar hydraulic fracturing of coal beds shallower than 300 feet. *State Oil and Gas Board of Alabama Administrative Code* Rule 400-3-8-.03(6)(d).

6. Proposals for fracturing of coal beds between 300 and 749 feet provide for a review of fresh-water supply wells within a quarter-mile radius of the coalbed methane gas well. *State Oil and Gas Board of Alabama Administrative Code* Rule 400-3-8-.03(6)(c)3.

7. The regulations require that operators certify that fracturing fluids not exceed the federal maximum contaminant levels. *State Oil and Gas Board of Alabama Administrative Code* Rule 400-3-8-.03(3).

The Alabama program, with its layers of protection, has been effective. Dr. Donald F. Oltz, Alabama State Geologist, testified as follows at the EPA hearings:

> I am aware of no case in Alabama where hydraulic fracturing has caused the contamination of any underground sources of drinking water. Furthermore, it is doubtful that hydraulic fracturing will cause the contamination of any underground sources of drinking water. . . . [E]ssentially all the fluids utilized in a hydraulic fracturing operation are recovered from the formation and removed from the well after the fracturing operation is completed.

R. File Folder 6, § 11, Public Hearing Transcript, pp. 34, 35.

LEAF's principal argument in the Petition is that Alabama's approved program does not provide that operators of coalbed methane wells must satisfy the state that their proposed hydraulic fracturing will not result in the presence

of any contaminant in USDW that may adversely affect the health of persons. LEAF's argument ignores that Alabama's UIC Program prohibits the presence of a "contaminant" that "adversely affect[s] the health of persons." *State Oil and Gas Board of Alabama Administrative Code* Rule 400-3-8-.03(2). Specifically the Board's regulations provide that:

> Coal beds shall not be hydraulically fractured in a manner that allows the movement of fluid containing any contaminant into a USDW, if the presence of that contaminant may . . . otherwise adversely affect the health of persons.
>
> *Id.*

When Congress amended the Safe Drinking Water Act in 1980, Congress provided an alternative for the states to obtain primary responsibility ("primacy") for oil and gas programs. Section 1425 of the Safe Drinking Water Act, codified at 42 U.S.C. § 300h. Congress adopted the 1980 amendment to give the states flexibility in enforcing the Safe Drinking Water Act. EPA guidance information stated that the 1980 amendment to the Safe Drinking Water Act provided "an alternative method for a State to obtain primary enforcement responsibility for those portions of the [UIC] program related to the recovery and production of oil and gas." 46 Fed. Reg. 27333 (1981). Furthermore, in the guidance information,

> EPA is mindful of the fact that, in enacting Section 1425, Congress intended that States be offered an alternative to the detailed requirements of the regulations promulgated at 40 C.F.R. 122, 123, 124, and 146.
>
> *Id.*

EPA's guidance explicitly recognized that "[a] State may choose to apply in a different form and make demonstrations different from those suggested." *Id.*

LEAF argues that the Alabama UIC Program must fail under the Safe Drinking Water Act unless an operator is required to *certify* that the fracturing fluid will not result in the presence of any contaminant in drinking water sources that may adversely affect the health of persons.

Such strict application of the Safe Drinking Water Act is inconsistent with the Act and the regulations promulgated under the Act. LEAF argued the same point before the Eleventh Circuit, and the Court rejected it. The Board's rule approved by EPA (1) requires the operator to certify that the fracture fluids "not exceed the maximum contaminant levels" in the federal regulations for drinking water, and (2) bans fracturing if the fracturing fluid contains a contaminant that may "adversely affect the health of persons." *State Oil and Gas Board of Alabama Administrative Code* Rule 400-3-8-.03(2). This rule complies with the SDWA.

The Eleventh Circuit correctly affirmed the determination by EPA pursuant to Section 1425 of the Safe Drinking Water Act that Alabama's UIC Program represents an effective program to prevent underground injection that endangers drinking water sources.

III. The Court should not issue a Writ of Certiorari to review an appeal of an interlocutory order of a lower court.

The Supreme Court "should not issue a writ of certiorari to review a decree of the Circuit Court of Appeals on appeal of an interlocutory order unless it is necessary to prevent extraordinary inconvenience . . . in the conduct of the cause." *American Construction Co. v. Jacksonville, T. & K. W. Ry. Co.*, 148 U.S. 372, 384 (1893).

In its decision, the U.S. Eleventh Circuit denied the LEAF petition in part and granted the petition in part. *LEAF*, 276 F.3d at 1265. Specifically, the Court remanded the petition "to EPA to determine whether Alabama's revised UIC Program complies with the requirements for Class II wells." *Id.* at 1264. Therefore, LEAF's petition for certiorari is due to be denied because the Eleventh Circuit's decision is not final, and an additional ruling on the remanded issue will be forthcoming.

CONCLUSION

For the reasons stated, the petition for writ of certiorari is due to be denied.

Respectfully submitted,

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APPENDIX

STATE OIL AND GAS BOARD OF ALABAMA ADMINISTRATIVE CODE RULE 400-3-8-.03

400-3-8-.03. Protection of Underground Sources of Drinking Water during the Hydraulic Fracturing of Coal Beds.

(1) Each coal bed shall be hydraulically fractured so as not to endanger any underground source of drinking water (USDW). If hydraulic fracturing operations result in irreparable damage to the coalbed methane gas well, or endanger any USDW, then such well shall be properly plugged and abandoned in accordance with Rule 400-3-4-.14, Plugging and Abandonment of Wells. Furthermore, the remediation of a USDW that has been endangered by hydraulic fracturing operations may be required.

(2) Coal beds shall not be hydraulically fractured in a manner that allows the movement of fluid containing any contaminant into a USDW, if the presence of that contaminant may:

(a) cause a violation of any applicable primary drinking water regulation under 40 C.F.R. § 141; or

(b) otherwise adversely affect the health of persons.

(3) The operator shall certify in writing to the Supervisor that the proposed fracturing operation will not occur in a USDW. Evidence that supports how the determination was made shall accompany such certification and be acceptable to the Supervisor. Otherwise, the operator shall certify in writing to the Supervisor that the mixture of fluids to be used to hydraulically fracture the coal beds does not exceed the maximum contaminant levels contained in 40 C.F.R. § 141 Subparts B and G.

(4) A proposal to fracture a coal group shall be accompanied by a check or bank draft in the amount of one hundred seventy five dollars ($175) payable to the State Treasurer, State of Alabama, which sum is fixed as the fee for each proposal. The fee shall be deposited into the Alabama State Oil and Gas Board Special Fund pursuant to Section 9-17-24 of the Code of Alabama (1975).

(5) Coal beds shall not be hydraulically fractured until the written approval of the Supervisor is obtained. Operators should inform the Supervisor of the proposed coal beds to be hydraulically fractured at the time of complying with the permitting requirements of Rule 400-3-2-.01, Well Permit. Approval of intent to hydraulically fracture coal beds, whether initially or for maintenance purposes, shall be in accordance with Rule 400-3-3-.03, Approval of Activities. In accordance with Rule 400-3-3-.03(2), the Supervisor may send a duly authorized representative to the location to witness the fracturing operation.

(6) The Supervisor shall consider the following procedures and information when evaluating proposals to hydraulically fracture coal beds:

(a) Coal beds below a depth of one thousand (1,000) feet.

1. Special Field Rules shall be reviewed by the Supervisor in order to ensure that coal beds to be fractured are within the depth interval(s) recognized for development by the Board. In the absence of Special Field Rules, the operator shall provide information to the Board accurately delineating the depth interval and nomenclature of the coal beds to be fractured.

2. Construction of the coalbed methane gas well shall be evaluated by the Supervisor to ensure compliance with the requirements of Rule 400-3-4-.09, Casing, Cementing, and

Test Pressure Requirements. Hydraulic fracturing will not be allowed unless the coalbed methane gas well is constructed in accordance with the requirements of Rule 400-3-4-.09. Any coalbed methane gas well that is not constructed in accordance with Rule 400-3-4-.09 shall not be allowed to produce and may be required to be immediately plugged and abandoned.

3. Casing and cementing specifications for the coalbed methane gas well shall be submitted to the Board on Form OGB-7, Well Record and Completion or Recompletion Report. However, if the coalbed methane gas well is in a state of completion or recompletion, and Form OGB-7 is not required to be filed with the Board prior to the fracturing operation, then the Supervisor shall require the operator to submit a wellbore schematic showing the specifications of the casing and cementing program. The depth interval(s) and nomenclature of the coal beds to be fractured must also be shown on the schematic.

4. The Board's Activity Report shall be used to verify the drilling and completion history of the coalbed methane gas well to be fractured. Form OGB-7 and wellbore schematics, if required, will be checked for consistency with the Board's Activity Report.

5. A geophysical log, or gamma ray log, shall be evaluated to determine the type and thickness of strata overlying the uppermost coal bed to be fractured. Impervious strata, such as shale, must overlie the uppermost coal bed and be of sufficient thickness and consistency to serve as a barrier to the upward movement of fluids. Otherwise, a fracturing proposal will be denied.

(b) Coal beds in the depth interval seven hundred fifty (750) to one thousand (1,000) feet.

1. Sections (a)1, (a)2, (a)3, (a)4, and (a)5 of this rule shall be applicable to the evaluation of proposals to hydraulically fracture coal beds in the depth interval seven hundred fifty (750) to one thousand (1,000) feet. Additionally, the Supervisor shall also consider the procedures and information requirements in section (b)2 of this rule when evaluating proposals to hydraulically fracture in this depth interval.

2. If available, a cement bond log (CBL) shall be evaluated to ascertain the top of cement and degree of bonding above the uppermost coal bed to be fractured. A CBL will be the primary tool in determining if the annular space between the production casing and borehole is adequately cemented to prevent upward movement of fluids during fracturing operations. Otherwise, cement volume and yield and borehole size will be used in calculating the top of cement. If not filed previously, operators shall provide the Supervisor with all available information that is necessary in making this determination.

(c) Coal beds in the depth interval three hundred (300) to seven hundred forty nine (749) feet.

1. Section (b)1 of this rule shall be applicable to the evaluation of proposals to hydraulically fracture coal beds in the depth interval three hundred (300) to seven hundred forty nine (749) feet. Additionally, the Supervisor shall also consider the procedures and information requirements in sections (c)2, (c)3, and (c)4 of this rule when evaluating proposals to hydraulically fracture in this depth interval.

2. A CBL shall be evaluated to ascertain the top of cement and degree of bonding above the uppermost coal bed to be fractured. The CBL will be used in determining if the annular space between the production casing and borehole is adequately cemented to prevent upward movement of fluids

during fracturing operations. If a CBL is not available, the Supervisor will not consider a fracturing proposal in the depth interval three hundred (300) to seven hundred forty nine (749) feet.

3. Records of fresh-water supply wells located within a one quarter- (1/4-) mile radius of the coalbed methane gas well shall be used in delineating the construction and completion depth of such supply wells. Published reports maintained in the library of the Geological Survey of Alabama (GSA) and in open-files of the Hydrogeology Division of the GSA shall be the source of information used in this evaluation process. A representative of the Board shall conduct a field reconnaissance within a one quarter- (1/4-) mile radius of the coalbed methane gas well to determine the location of any additional fresh-water supply wells that may not be identified in the previously described documents. If possible, construction information for such additional fresh-water supply wells will be obtained. Consideration shall be given to the records of all fresh-water supply wells available to the Supervisor. Fracturing proposals shall be denied if the Supervisor determines that any fresh-water supply well located within a one quarter- (1/4-) mile radius of the coalbed methane gas well could be adversely impacted in the manner described in section (2) of this rule as a result of the fracturing operation.

4. A program describing the proposed fracturing operation shall be used in conjunction with the evaluation process described in section (c)3 of this rule. Information to be considered shall include, but not be limited to, the maximum length and orientation of the fracture(s) to be propagated and the type fluids and materials that are to be utilized. Programs to hydraulically fracture shall be prepared by a person, or entity, familiar with the technicalities of fracturing coal beds in the area in which fracturing

operations are proposed. Operators shall submit the fracturing program to the Supervisor. Proposals in the depth interval three hundred (300) to seven hundred forty nine (749) feet for which a fracturing program has not been made available to the Supervisor shall be denied. The proposal filed with the Board shall identify the person, or entity, that has prepared the fracturing program and be accompanied by a letter from the operator stating its intended application. Recurrent filing of a fracturing program will not be necessary if such program has previously been approved by the Supervisor and is directly applicable to the fracturing proposal under consideration. Modification(s) to a fracturing program that would alter the maximum length and orientation of the fracture(s) to be propagated, or the type fluids and material to be utilized, shall be approved by the Supervisor prior to its implementation in the field. All approved fracturing programs shall be filed in a central location in the Board's office and shall be maintained as a public record.

(d) Coal beds in the depth interval zero (0) to two hundred ninety nine (299) feet. Hydraulic fracturing of coal beds in the depth interval zero (0) to two hundred ninety nine (299) feet is prohibited.

(6) The Supervisor may request the submittal of additional information not contained in these procedures in order to clarify a proposal to hydraulically fracture a coal bed. Additional information may also be requested in order for the Supervisor to determine if the proposed fracturing operation could endanger any USDW. It shall be the operator's responsibility to furnish such additional information; otherwise, the fracturing proposal shall be denied.

(7) The operator shall maintain all records associated with each proposal approved by the Supervisor and implemented by the operator to hydraulically fracture coal beds. Such records shall be maintained until such time that the coalbed methane gas well has been plugged for permanent abandonment, but not less than three (3) years following completion of the fracturing operation. Upon request, copies of these records shall be made available to the Supervisor.